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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-md-02311 Honorable Marianne O. Battani
In Re: ALL CASES	
THIS RELATES TO: All Dealership Actions All End Payor Actions	

DEFENDANTS' MOTION TO LIFT THE PROVISIONAL SEALING OF A PORTION OF THE RULE 30(b)(1) DEPOSITION OF GEORGE R. NISBET, THE CO-OWNER OF AUTO DEALER PLAINTIFF THORNHILL SUPERSTORE

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Pursuant to Federal Rules of Civil Procedure 26 and 37(a) and the Special Master's instruction on March 3, 2016, Defendants hereby move the Court to lift the Special Master's provisional seal on a portion of the transcript of the Rule 30(b)(1) deposition of George R. Nisbet, Jr., co-owner of Auto Dealer Plaintiff Thornhill Superstore, Inc. Defendants' proposed order is attached.

As required by Local Rule 7.1(a), counsel for Defendants telephonically met and conferred with counsel for Auto Dealer Plaintiffs on March 18, 2016, during which time Defendants explained the nature of the relief sought by this Motion and its legal basis but did not obtain concurrence.

Respectfully submitted,

WILMER CUTLER PICKERING
HALE AND DORR LLP

April 8, 2016

By: */s/ Steven F. Cherry*

Steven F. Cherry
David P. Donovan
Patrick J. Carome
Dyanne Griffith
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
steven.cherry@wilmerhale.com
david.donovan@wilmerhale.com
patrick.carome@wilmerhale.com
dyanne.griffith@wilmerhale.com

Attorneys for Defendants DENSO Corporation, DENSO International America, Inc., DENSO International Korea Corporation, DENSO Korea Automotive Corporation, DENSO Products & Services Americas, ASMO Co., Ltd., ASMO North America, LLC, ASMO Greenville of North Carolina, Inc., ASMO Manufacturing,

REDACTED

Inc., and ASMO North Carolina Inc.

Steven M. Zarowny (P33362)
General Counsel
DENSO International America, Inc.
24777 Denso Drive
Southfield, MI 48033
Tel.: (248) 372-8252
Fax: (248) 213-2551
steve_zarowny@denso-diam.com

Attorney for Defendant DENSO International America, Inc.

SQUIRE PATTON BOGGS (US) LLP

April 8, 2016 By: */s/ Barry A. Pupkin* (w/consent)

Barry A. Pupkin
Iain R. McPhie
Jeremy W. Dutra
SQUIRE PATTON BOGGS (US) LLP
2550 M Street, N.W.
Washington, DC 20037
Tel: (202) 626-6600
Fax: (202) 626-6780
Barry.Pupkin@squirepb.com
Iain.McPhie@squirepb.com
Jeremy.Dutra@squirepb.com

Counsel for Aisan Industry Co., Ltd., Aisan Corporation of America, Franklin Precision Industry, Inc. and Hyundam Industrial Co., Ltd.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

April 8, 2016 By: /s/ *Jeremy Calsyn* (w/consent)

Jeremy Calsyn
Bradley Justus
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
Tel.: (202) 974-1500
Fax: (202) 974-1999
jcalsyn@cgsh.com
bjustus@cgsh.com

/s/ *Howard B. Iwrey* (w/consent)

REDACTED

Howard B. Iwrey (P39635)
DYKEMA GOSSETT PLLC
39577 Woodward Ave., Suite 300
Bloomfield Hills, MI 48304
Tel.: (248) 203-0526
Fax: (248) 203-0763
hiwrey@dykema.com

Counsel for Defendants Aisin Seiki Co., Ltd., and Aisin Automotive Casting, LLC in Valve Control Timing Devices/Aisin Defendants (2500) *actions*

BROOKS WILKINS SHARKEY & TURCO PLLC

April 8, 2016 By: */s/ Maureen T. Taylor* (w/consent)

Herbert C. Donovan (P51939)
Maureen T. Taylor (P63547)
BROOKS WILKINS SHARKEY & TURCO PLLC
401 Old South Woodward, Suite 400
Birmingham, MI 48009
Telephone: (248) 971-1721
Fax: (248) 971-1801
taylor@bwst-law.com
donovan@bwst-law.com

Attorneys for Defendants Alps Electric Co., Ltd.; Alps Electric (North America), Inc.; and Alps Automotive, Inc.

WEIL, GOTSHAL & MANGES LLP

April 8, 2016 By: */s/ Steven A. Reiss* (w/consent)

Steven A. Reiss
Adam C. Hemlock
Kajetan Rozga
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153-0119
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
steven.reiss@weil.com
adam.hemlock@weil.com
kajetan.rozga@weil.com

/s/ Frederick R. Juckniess (w/consent)

Frederick R. Juckniess
SCHIFF HARDIN LLP
350 South Main Street, Suite 210

REDACTED

Ann Arbor, MI 48104
(734) 222-1504
fjuckniess@schiffhardin.com

Attorneys for Defendants Bridgestone Corporation and Bridgestone APM Company

WEIL, GOTSHAL & MANGES LLP

April 8, 2016

By: */s/ Steven A. Reiss* (w/consent)

Steven A. Reiss
Adam C. Hemlock
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153-0119
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
steven.reiss@weil.com
adam.hemlock@weil.com

/s/ Fred K. Herrmann (w/consent)

Fred K. Herrmann
Joanne G. Swanson
Matthew L. Powell
KERR RUSSELL & WEBER PLC
500 Woodward Avenue
Suite 2500
Detroit, MI 48226
Tel. (313) 961-0200
Fax (313) 961-0388
fherrmann@kerr-russell.com
jswanson@kerr-russell.com
mpowell@kerr-russell.com

Attorneys for Calsonic Kansei Corporation and CalsonicKansei North America, Inc.

/s/ Steven A. Reiss (w/consent)

Steven A. Reiss
Adam C. Hemlock
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153-0119
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
steven.reiss@weil.com
adam.hemlock@weil.com

REDACTED

/s/ Michael A. Cox (w/consent)
Michael A. Cox
THE MIKE COX LAW FIRM, PLLC
17430 Laurel Park Drive North, Suite 120 E
Livonia, MI 48152
Telephone: (734) 591-4002
mc@mikecoxlaw.com

Attorneys for Calsonic Kansei Corporation and CalsonicKansei North America, Inc.

SIMPSON THACHER & BARTLETT LLP

April 8, 2016 By: */s/ Matthew J. Reilly* (w/consent)
Matthew J. Reilly
Abram J. Ellis
SIMPSON THACHER & BARTLETT LLP
900 G Street, N.W.
Washington, D.C. 20001
Tel.: (202) 636-5500
Fax: (202) 636-5502
matt.reilly@stblaw.com
aellis@stblaw.com

George S. Wang
Shannon K. McGovern
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, N.Y. 10017
Tel: (212) 455-2000
Fax: (212) 455-2502
gwang@stblaw.com
smcgovern@stblaw.com

Attorneys for Defendants Diamond Electric Mfg. Co., Ltd. and Diamond Electric Mfg. Corp.

PORTER WRIGHT MORRIS & ARTHUR LLP

April 8, 2016 By: */s/ Donald M. Barnes* (w/consent)
Donald M. Barnes
Molly S. Crabtree
Jay L. Levine
Christopher C. Yook
PORTER WRIGHT MORRIS & ARTHUR LLP

REDACTED

1900 K Street, NW, Ste. 1110
Washington, DC 20006
Tel.: (202) 778-3054
Fax: (202) 778-3063
dbarnes@porterwright.com
mcrabtree@porterwright.com
jlevine@porterwright.com
cyook@porterwright.com

Attorneys for Defendants G.S. Electech, Inc., G.S.W. Manufacturing, Inc., and G.S. Wiring Systems, Inc.

COVINGTON & BURLING LLP

April 8, 2016

By: /s/ *Bruce A. Baird* (with consent)_____

Bruce A. Baird
Sarah L. Wilson
Michael A. Fanelli
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
Telephone: (202) 662-6000
Fax: (202) 662-6291
bbaird@cov.com
swilson@cov.com
mfanelli@cov.com

Anita F. Stork
COVINGTON & BURLING LLP
One Front Street
35th Floor
San Francisco, CA 94111
Telephone: (415) 591-6000
Fax: (415) 955-6550
astork@cov.com

BROOKS WILKINS SHARKEY & TURCO PLLC
Maureen T. Taylor
BROOKS WILKINS SHARKEY & TURCO PLLC
401 Old South Woodward, Suite 400
Birmingham, MI 48009
Telephone: (248) 971-1721

REDACTED

Fax: (248) 971-1801
taylor@bwst-law.com

Attorneys for Defendant Keihin North America, Inc.

ARNOLD & PORTER LLP

April 8, 2016 By: /s/ *Franklin R. Liss* (with consent)

Franklin R. Liss
Barbara H. Wootton
Danielle M. Garten
Matthew Tabas
ARNOLD & PORTER LLP
601 Massachusetts Ave, NW
Washington, DC 20001
Tel: (202) 942-5969
Fax: (202) 942-5999
frank.liss@aporter.com
barbara.wootton@aporter.com
danielle.garten@aporter.com
matt.tabas@aporter.com

/s/ *Howard B. Iwrey* (with consent)

Howard B. Iwrey (P39635)
Brian M. Moore (P58584)
DYKEMA GOSSETT PLLC
39577 Woodward Ave., Suite 300
Bloomfield Hills, MI 48304
Tel: (248) 203-0700
Fax: (248) 203-0763
hiwrey@dykema.com
bmoore@dykema.com

Counsel for Koito Manufacturing Co., Ltd. and North American Lighting, Inc. in HID Ballasts (1700) *and* Lamps (1200) *actions*

PILLSBURY WINTHROP SHAW PITTMAN LLP

April 8, 2016 By: */s/ William M. Sullivan Jr.* (w/consent)

William M. Sullivan Jr.
Michael L. Sibarium
Jeetander T. Dulani
PILLSBURY WINTHROP SHAW

REDACTED

PITTMAN LLP
1200 Seventeenth Street, N.W.
Washington, D.C. 20036-3006
Telephone: (202) 663-8000
Facsimile: (202) 663-8007
wsullivan@pillsburylaw.com
michael.sibarium@pillsburylaw.com
jeetander.dulani@pillsburylaw.com

Counsel for Defendants Mikuni America Corporation and Mikuni Corp

GIBSON, DUNN & CRUTCHER LLP

April 8, 2016 By: */s/ George A. Nicoud* (w/consent)

George A. Nicoud III
Austin Schwing
Caeli A. Higney
Brandon W. Halter
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105-0921
Tel.: (415) 393-8200
Fax: (415) 393-8306
TNicoud@gibsondunn.com
ASchwing@gibsondunn.com
CHigney@gibsondunn.com
BHalter@gibsondunn.com

Counsel for Defendants Mitsuba Corporation and American Mitsuba Corporation

HOGAN LOVELLS US LLP

April 8, 2016 By: */s/ William L. Monts, III* (w/consent)

William L. Monts, III
HOGAN LOVELLS US LLP
555 13th Street, NW
Washington, DC 20004
Tel.: (202) 637-5731
Fax: (202) 637-5910
william.monts@hoganlovells.com

/s/ Scott T. Seabolt (w/consent)

Scott T. Seabolt
FOLEY & LARDNER LLP

REDACTED

500 Woodward Avenue,
Suite 2700
Detroit, MI 48226
Tel.: (313) 234-7115
Fax: (313) 234-2800
sseabolt@foley.com

Counsel for Defendants Mitsubishi Heavy Industries America, Inc. and Mitsubishi Heavy Industries Climate Control

LANE POWELL PC

April 8, 2016

By: */s/ Kenneth R. Davis II* (w/consent)

Craig D. Bachman
Kenneth R. Davis II
Darin M. Sands
Masayuki Yamaguchi
MODA Tower
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2100
bachmanc@lanepowell.com
davisk@lanepowell.com
sandsd@lanepowell.com
yamaguchim@lanepowell.com

Larry S. Gangnes
LANE POWELL PC
U.S. Bank Centre
1420 Fifth Avenue, Suite 4200
PO Box 91302
Seattle, WA 98111-9402
Telephone: 206.223.7000
gangnesl@lanepowell.com

Richard D. Bisio (P30246)
Ronald S. Nixon (P57117)
KEMP KLEIN LAW FIRM
201 W. Big Beaver, Suite 600
Troy, MI 48084
Telephone: 248.528.1111
richard.bisio@kkue.com
ron.nixon@kkue.com

Attorneys for Defendants Nachi-Fujikoshi Corp.

REDACTED

and Nachi America Inc.

WINSTON & STRAWN LLP

April 8, 2016 By: */s/ Jeffrey L. Kessler* (w/consent)

A. Paul Victor
Jeffrey L. Kessler
Jeffrey J. Amato
Molly M. Donovan
Elizabeth A. Cate
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 294-6700
Facsimile: (212) 294-4700
pvictor@winston.com
jkessler@winston.com
mmdonovan@winston.com
jamato@winston.com
ecate@winston.com

Fred K. Herrmann (P49519)
KERR, RUSSELL AND WEBER, PLC
500 Woodward Avenue, Suite 2500
Detroit, MI 48226
Tel. (313) 961-0200
fherrmann@kerr-russell.com

Attorneys for Defendants NTN Corporation and NTN USA Corporation

WINSTON & STRAWN LLP

April 8, 2016 By: /s/ *Jeffrey L. Kessler* (w/consent)

Jeffrey L. Kessler
A. Paul Victor
Eva W. Cole
Jeffrey J. Amato
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193
(212) 294-6700 (t)
(212) 294-4700 (f)
JKessler@winston.com
PVictor@winston.com
EWCole@winston.com

REDACTED

JAmato@winston.com

Brandon Duke
WINSTON & STRAWN LLP
1111 Louisiana Street, 25th Floor
Houston, TX 77002
(713) 651-2636 (t)
(713) 651-2700 (f)
BDuke@winston.com

Counsel for Panasonic Corporation and Panasonic Corporation of North America

ALLEN & OVERY LLP

April 8, 2016

By: */s/ John Roberti* (w/consent)_____

John Roberti
Matthew R. Boucher
ALLEN & OVERY LLP
1101 New York Avenue NW
Washington, D.C. 20005
202-683-3800
john.roberti@allenovery.com
matthew.boucher@allenovery.com

Michael S. Feldberg
ALLEN & OVERY LLP
1221 Avenue of the Americas
New York, NY 10020
212-610-6360
michael.feldberg@allenovery.com

William R. Jansen (P36688)
Michael G. Brady (P57331)
WARNER NORCROSS & JUDD LLP
2000 Town Center, Suite 2700
Southfield, MI 48075-1318
248-784-5000
wjansen@wnj.com
mbrady@wnj.com

Counsel for Robert Bosch LLC and Robert Bosch GmbH

DUBOIS, BRYANT & CAMPBELL, LLP

REDACTED

April 8, 2016

By: */s/ J. David Rowe* (w/consent)

J. David Rowe
Millicent Lundburg
DUBOIS, BRYANT & CAMPBELL, LLP
Colorado Tower
303 Colorado, Suite 2300
Austin, Texas 78701
(512) 457-8000
(512) 457-8008 (fax)
drowe@dbcllp.com
mlundburg@dbcllp.com

DUGGINS WREN MANN & ROMERO, LLP
Robert E. Linkin
600 Congress Avenue, Ste. 1900
P. O. Box 1149
Austin, Texas 78767-1149
512-744-9300 tel.
512-744-9399 fax.
rlinkin@dwmrlaw.com

HERTZ SCHRAM PC
Bradley J. Schram (P26337)
Matthew J. Turchyn (P76482)
1760 South Telegraph Road, Suite 300
Bloomfield Hills, MI 48302
(248) 335-5000
bschram@hertzschram.com
mturchyn@hertzschram.com

Attorney for Defendant Sanden International (USA), Inc.

SIMPSON THACHER & BARTLETT LLP

April 8, 2016

By: */s/ Matthew J. Reilly* (w/consent)

Matthew J. Reilly
Abram J. Ellis
David T. Shogren
SIMPSON THACHER & BARTLETT LLP
900 G Street, N.W.
Washington, D.C. 20001
Tel.: (202) 636-5500
Fax: (202) 636-5502
matt.reilly@stblaw.com
aellis@stblaw.com

REDACTED

dshogren@stblaw.com

George S. Wang
Shannon K. McGovern
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, N.Y. 10017
Tel: (212) 455-2000
Fax: (212) 455-2502
gwang@stblaw.com
smcgovern@stblaw.com

Attorneys for Defendants Stanley Electric Co., Ltd., Stanley Electric U.S. Co., Inc., and II Stanley Co., Inc.

MORGAN LEWIS & BOCKIUS LLP

April 8, 2016 By: */s/ J. Clayton Everett, Jr.* (w/consent)

J. Clayton Everett, Jr.
MORGAN LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 739-3000
Facsimile: (202) 739-3001
jeverett@morganlewis.com

Counsel for Defendants Sumitomo Riko Company Limited and DTR Industries, Inc.

SIDLEY AUSTIN LLP

April 8, 2016 By: */s/ David C. Giardina* (w/consent)

David C. Giardina
Courtney A. Hoffmann
SIDLEY AUSTIN LLP
One S. Dearborn St.
Chicago, IL 60603
Tel.: (312) 853-7000
Fax: (312) 853-7036
dgiardina@sidley.com
choffmann@sidley.com

Bradley J. Schram (MI Bar # P26337)
HERTZ SCHRAM PC
1760 S. Telegraph Rd., Suite 300

Bloomfield Hills, MI 48302
Tel.: (248) 335-5000
Fax: (248) 335-3346
bschram@hertzschram.com

Counsel for Defendants Toyo Tire & Rubber Co., Ltd., Toyo Tire North America Manufacturing Inc., Toyo Tire North America OE Sales LLC, and Toyo Automotive Parts (USA), Inc.

BAKER BOTTS L.L.P.

April 8, 2016 By: */s/ Randall J. Turk* (w/consent)

Randall J. Turk
John Taladay
Mark Miller
Heather Souder Choi
Sterling A. Marchand
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue., NW
Washington, D.C. 20004-2400
Phone: 202.639.7700
Fax: 202.639.7890
randy.turk@bakerbotts.com
john.taladay@bakerbotts.com
mark.miller@bakerbotts.com
heather.choi@bakerbotts.com

Counsel for Defendants Toyoda Gosei Co., Ltd., Toyoda Gosei North America Corp., and TG Missouri Corp.

BUTZEL LONG

April 8, 2016 By: */s/ Sheldon H. Klein* (w/consent)

Sheldon H. Klein (P41062)
David F. DuMouchel (P25658)
BUTZEL LONG
150 West Jefferson, Suite 100
Detroit, MI 48226
Tel.: (313) 225-7000
Fax: (313) 225-7080
sklein@butzel.com
dumouchd@butzel.com

W. Todd Miller

REDACTED

BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW, Suite 300
Washington, DC 20037
Tel.: (202) 663-7820
Fax: (202) 663-7849
TMiller@bakerandmiller.com

Attorneys for Defendants TRAM, Inc. and Tokai Rika Co., Ltd.

LATHAM & WATKINS LLP

April 8, 2016

By: /s/ *Marguerite M. Sullivan* (w/consent)

Marguerite M. Sullivan
Allyson M. Maltas
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004
Tel: (202) 637-2200
Fax: (202) 637-2201
Maggy.Sullivan@lw.com
Allyson.Maltas@lw.com

/s/ *Howard B. Iwrey* (w/consent)

Howard B. Iwrey (P39635)
DYKEMA GOSSETT PLLC
39577 Woodward Ave., Suite 300
Bloomfield Hills, MI 48304
Tel: (248) 203-0526
Fax: (248) 203-0763
hiwrey@dykema.com

Counsel for Weastec, Inc. in Ignition Coils (1400) *actions*

REDACTED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-md-02311 Honorable Marianne O. Battani
In Re: ALL CASES	
THIS RELATES TO: All Dealership Actions All End Payor Actions	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO LIFT THE PROVISIONAL SEALING OF A PORTION OF THE RULE 30(b)(1) DEPOSITION OF GEORGE R. NISBET, THE CO-OWNER OF AUTO DEALER PLAINTIFF THORNHILL SUPERSTORE

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STATEMENT OF THE ISSUES PRESENTED

Should the Special Master lift his *provisional* seal of a portion of the transcript of the Rule 30(b)(1) deposition of George R. Nisbet (co-owner of Auto Dealer Plaintiff Thornhill Superstore) where (1) such testimony focused on Thornhill Superstore's practices regarding pricing of new vehicles and recordkeeping about new vehicle sales during a substantial part of the alleged class periods in the Auto Parts MDL, and therefore is highly relevant to Auto Dealer Plaintiffs' claims, Defendants' defenses to those claims, the suitability of Thornhill Superstore as a representative of the putative classes of Auto Dealers, and issues concerning whether the putative classes of Auto Dealers may be certified in any of these cases; and (2) Auto Dealers' counsel's instruction that Mr. Nisbet not provide such testimony based on a "relevance" objection was improper and groundless.

Answer: Yes.

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STATEMENT OF CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Fed. R. Civ. P. 30(c)(2)

In re Class 8 Transmission Indirect Purchaser Antitrust Litig., Civ. No. 11-00009-SLR, 2015 WL 6181748 (D. Del. Oct. 21, 2015)

In re Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996)

REDACTED

TABLE OF CONTENTS

STATEMENT OF THE ISSUE PRESENTED i

STATEMENT OF CONTROLLING OR MOST APPROPRIATE AUTHORITIES ii

INTRODUCTION 1

FACTUAL BACKGROUND 2

ARGUMENT 6

MR. NISBET'S SEALED DEPOSITION TESTIMONY IS RELEVANT, DISCOVERABLE, AND NOT LIMITED BY ANY PRIOR ORDER 6

A. Mr. Nisbet's Testimony About Thornhill's Pricing and Recordkeeping Practices Is Highly Relevant. 6

B. The Remainder of Mr. Nisbet's Deposition Testimony Would Be Misleading If the Provisionally Sealed Portion Were Unavailable for Use by the Parties and the Court. 9

C. The Special Master's December 29, 2015 Order on Topics for Rule 30(b)(6) Depositions Has No Bearing on Mr. Nisbet's Rule 30(b)(1) Deposition. 10

CONCLUSION 12

REDACTED

TABLE OF AUTHORITIES

Page(s)

CASES

Barnes v. Bd. of Educ.,
No. 2:06-cv-0532, 2007 WL 1236190 (S.D. Ohio Apr. 26, 2007).....2

Hochstein v. Microsoft Corp.,
No. 04-73071, 2009 WL 2616253 (E.D. Mich. Aug. 21, 2009).....1

In re Am. Med. Sys., Inc.,
75 F.3d 1069 (6th Cir. 1996) 8

In re Auto. Parts Antitrust Litig.,
No. 12-md-02311, 2013 WL 2456612 (E.D. Mich. June 6, 2013).....6

In re Class 8 Transmission Indirect Purchaser Antitrust Litig.,
Civ. No. 11-00009-SLR, 2015 WL 6181748 (D. Del. Oct. 21, 2015).....6, 8

In re New Motor Vehicles Canadian Export Antitrust Litig.,
522 F.3d 6 (1st Cir. 2008).....6

In re Processed Egg Prods. Antitrust Litig.,
No. 08-md-2002, 2015 WL 6964281 (E.D. Penn. Nov. 10, 2015).....6

Nix v. Sword,
11 Fed. Appx. 498 (6th Cir. 2001).....5

Ralston Purina Co. v. McFarland,
550 F.2d 967 (4th Cir. 1977) 1

Resolution Trust Corp. v. Dabney,
73 F.3d 262 (10th Cir. 1995) 1

Robinson v. Texas Auto. Dealers Ass'n,
387 F.3d 416 (5th Cir. 2004) 7

Stanich v. (c)Travelers Indem. Co.,
259 F.R.D. 294 (N.D. Ohio 2011) 8

STATUTES, RULES, AND REGULATIONS

Fed. R. Civ. P. 26(c) 5

Fed. R. Civ. P. 30(b)(1).....2, 10, 11

REDACTED

Fed. R. Civ. P. 30(b)(6).....10, 11

Fed. R. Civ. P. 30(c)(2).....1

Fed. R. Civ. P. 30(d)(3).....5

OTHER AUTHORITY

Special Master's Order Granting in Part and Denying in
Part Plaintiffs' Motion For Protective Order, 12-md-02311, ECF No. 1169……10, 11

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INTRODUCTION

During the March 3, 2016 deposition of George R. Nisbet, co-owner of Auto Dealer Plaintiff Thornhill Superstore Inc. ("Thornhill"), Defendants' questioning focused on two topics that are critical to both the Auto Dealer Plaintiffs' cases and the End Payor Plaintiffs' cases: namely, Auto Dealers' pricing practices and the manner in which they recorded information concerning their sales of new vehicles. Thornhill and Mr. Nisbet were themselves defendants in prior lawsuits involving both of these issues, in which plaintiffs alleged Thornhill had engaged in deceptive pricing and recordkeeping practices from the late 1990s until approximately 2006. Defendants sought to use documents from those prior lawsuits—including sworn statements by Mr. Nisbet—to probe and refresh his recollection of Thornhill's pricing and recordkeeping practices during those years.

Based solely on "relevance" grounds, Auto Dealer counsel objected at Nisbet's deposition to questions involving Nisbet's prior testimony concerning Thornhill's pricing and recordkeeping practices and instructed Mr. Nisbet not to answer those questions. The parties called the Special Master, who ordered that Mr. Nisbet should answer Defendants' questions pending resolution of Auto Dealer Plaintiffs' objection, but that the affected portion of the transcript should be provisionally sealed until that time. Although Auto Dealer Plaintiffs clearly bear the burden under the Federal Rules of establishing why this testimony should not have been permitted, they have filed no motion seeking to strike it or otherwise to maintain it under seal.

That seal should now be lifted. Not only is relevance not a proper grounds for instructing a witness not to answer during a deposition,[1] but Mr. Nisbet's testimony is highly relevant. Among

[1] *See, e.g.*, Fed. R. Civ. P. 30(c)(2) ("the testimony is taken subject to any objection"); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) ("It is inappropriate to instruct a witness not to answer a question on the basis of relevance."); *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977); *Hochstein v. Microsoft Corp.*, No. 04-73071, 2009

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other things, he testified that [redacted] This evidence bears directly on whether Thornhill and/or its customers would have absorbed any alleged overcharge at different points in time, which is directly relevant both to class certification and to the merits of the Auto Dealers' and End Payors' claims (both liability and damages), and whether any party in the Auto Parts MDL can rely on the DMS data and other sales records produced by Thornhill. The Special Master should therefore lift the provisional seal imposed on this deposition testimony.

FACTUAL BACKGROUND

Mr. Nisbet has been a senior manager of Thornhill since 1996, and a co-owner since 1998. He was the first person associated with an Auto Dealer Plaintiff to be deposed in the Auto Parts MDL. Defendants took his deposition under Rule 30(b)(1) to explore his personal knowledge of Thornhill's vehicle pricing and sales practices, as well as the manner in which Thornhill recorded the terms of its sales in its business records—including the DMS data that Thornhill has produced to Defendants.

This was not the first time Mr. Nisbet had been deposed about these topics. Thornhill and Mr. Nisbet personally were previously *defendants* in two separate class action lawsuits brought by individuals who had purchased new vehicles from Thornhill and who alleged that Thornhill had engaged in deceptive and unlawful practices with respect to the pricing of those vehicles. *See Barker, et al. v. Thornhill Superstore*, Civil Action No. 02-cv-1255 (S.D.W.Va. Feb. 22, 2005);

WL 2616253, at *4 (E.D. Mich. Aug. 21, 2009); *Barnes v. Bd. of Educ.*, No. 2:06-cv-0532, 2007 WL 1236190, at *2 (S.D. Ohio Apr. 26, 2007).

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Jarrell, et al. v. Thornhill Superstore, et al., Civil Action No. 03-cv-1762 (Cir. Ct. Kanawha Cty., W. Va. Dec. 21, 2006). Specifically, Thornhill's customers claimed that, while Thornhill had represented that its sales from the late 1990s until approximately 2006 were made at one dollar over invoice price, it actually deviated substantially from that policy on numerous occasions, charging prices much higher than one dollar over invoice price. Thornhill's customers also claimed that it had misled them into paying various charges for fraudulent programs.

To effectively probe the facts regarding Thornhill's pricing, sales, and recordkeeping practices, Defendants sought to refresh Mr. Nisbet's recollection by referring to his prior sworn statements on these topics in the *Barker* and *Jarrell* lawsuits. Auto Dealer counsel, however, sought to block this inquiry, objecting [redacted] Ex. 1, Unsealed Nisbet Dep. Tr. at 241 (emphasis added). At that point, the parties suspended the deposition and called the Special Master to resolve the dispute. *Id.* at 241–42. During that call, the Special Master ruled that Defendants could question Mr. Nisbet on these topics, but that the resulting testimony should be preserved as part of a separate, provisionally "sealed" record pending further review by the Special Master. Ex. 2, Hearing Tr. at 9–10.[2] The present motion seeks to have the provisional seal lifted.

Pending a further ruling by the Special Master, the portion of the transcript of Mr. Nisbet's deposition concerning his prior sworn statements in the *Barker* and *Jarrell* lawsuits about Thornhill's pricing, sales, and recordkeeping practices has been temporarily quarantined from general usage in the Auto Parts MDL. The sealed portion of the transcript comprises eighty-one

[2] The court reporter present at the deposition created a transcript of the telephonic hearing before the Special Master.

pages. Ex. 3, Prov. Sealed Nisbet Dep. Tr. During this portion of his deposition, Defendants refreshed Mr. Nisbet's recollection with, and asked him questions about, his signed affidavit in *Jarrell*, Ex. 4, a Court Order from *Jarrell*, Ex. 5, and his deposition transcript from *Barker*, Ex. 6, all of which concern Thornhill's pricing, sales, and recordkeeping practices during a substantial portion of the class periods alleged in the present Auto Parts MDL. In response to these questions, Mr. Nisbet testified on a variety of critically relevant facts about Thornhill's practices for pricing and selling new vehicles to retail customers, as well as the manner in which Thornhill recorded the terms of its sales from the late 1990s to approximately 2006, about half of the alleged class periods in the present cases. In particular, he asserted:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

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[redacted]

- [redacted]
- [redacted]

Provisionally sealing the foregoing portion of Mr. Nisbet's deposition was an effective and efficient means to enable the Special Master to reserve a final decision on how this testimony should be handled until after he could engage in a further review of the issues and receive briefs from the parties. However, even though more than a month has passed since Mr. Nisbet's deposition, Auto Dealers have failed to step forward to provide any basis at all for maintaining the provisional seal, even though it is they who, under the applicable Federal Rules and case law, exclusively bear the heavy burden of showing a need for a protective order barring any line of inquiry at a deposition.[3] Accordingly, Defendants respectfully move that the provisional seal be lifted.

[3] *See, e.g.*, Fed. R. Civ. P. 26(c); Fed. R. Civ. P. 30(d)(3); *Nix v. Sword*, 11 Fed. Appx. 498, 500 (6th Cir. 2001).

ARGUMENT

MR. NISBET'S SEALED DEPOSITION TESTIMONY IS RELEVANT, DISCOVERABLE, AND NOT LIMITED BY ANY PRIOR ORDER

A. Mr. Nisbet's Testimony About Thornhill's Pricing and Recordkeeping Practices Is Highly Relevant

Mr. Nisbet's account of Thornhill's pricing and recordkeeping practices during a substantial portion of the alleged class periods in the Auto Parts MDL is directly relevant to the issues in these cases. His past under-oath statements on these topics are just as relevant as his most recent statements, and especially significant given their greater temporal proximity to the events at issue. In particular, the testimony Mr. Nisbet provided during the sealed portion of his deposition will be important to the determinations of whether, and to what extent, Thornhill absorbed (rather than passed-on to its customers) any alleged overcharges, whether the putative classes Thornhill and the other named Auto Dealers seek to represent should be certified, and whether Thornhill would be an appropriate representative of any such classes.

As Judge Battani has recognized, Auto Dealers and End Payors "face a difficult challenge in succeeding on their claims" because they must trace any alleged overcharges through successive resales. *In re Auto. Parts Antitrust Litig.*, No. 12-md-02311, 2013 WL 2456612, at *8 (E.D. Mich. June 6, 2013). Any effort to trace an alleged overcharge requires consideration of the many factors that influenced prices at each level of the distribution chain—based on accurate data. *See In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2015 WL 6964281, at *27–29 (E.D. Penn. Nov. 10, 2015) (refusing to certify a class of indirect purchasers because plaintiffs' expert failed to account for important market factors, including "the effects of . . . pricing strategy"); *In re Class 8 Transmission Indirect Purchaser Antitrust Litig.*, Civ. No. 11-00009-SLR, 2015 WL 6181748, at *10 & n.14 (D. Del. Oct. 21, 2015) (analysis must be based on "real-world facts surrounding [the] market"); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 29 (1st

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Cir. 2008) (vacating class certification of a class of end-payor purchasers of new vehicles because plaintiffs could not rely on market assumption "that any price increase or decrease will always have the same magnitude of effect on the final price paid"); *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 423 (5th Cir. 2004) (denying class certification of a class of vehicle purchasers because plaintiffs' assumption that overcharges had been passed on to every customer "defies the realities of the haggling that ensues in the American market when one buys a vehicle").

The testimony in the sealed portion of Mr. Nisbet's deposition transcript is necessary to trace any alleged overcharge from the OEM through Thornhill to end payors. For example, during the period in which Mr. Nisbet testified that [redacted] the experts may find that—to the extent that any alleged overcharge was reflected in the invoice price and not offset in some way by the OEM in its sale to Thornhill or by Thornhill in its sale to its customers—any overcharge would have been wholly passed on to Thornhill's customers. Under that analysis, Thornhill may not have any injury or any damages for that time period. The experts' analysis, however, would change for the subsequent time period during which Mr. Nisbet testified that [redacted] Thus, Mr. Nisbet's testimony is critical to determining whether Thornhill and/or its customers absorbed any alleged overcharges and, if so, whether and how that changed at different points in time during the alleged class periods.

Defendants are entitled to compare and contrast Thornhill's pricing and related business practices during the late 1990s and into the mid-2000s with both Thornhill's practices in more recent years and with the practices of other named Auto Dealer Plaintiffs. This testimony is fundamental to whether Auto Dealers or End-Payors can prove class-wide impact using common

evidence. Only after such "real world" facts are unearthed during discovery, evaluated by the parties and their experts, and then presented to and analyzed by Judge Battani, will the Court be able to determine whether the putative classes of auto dealers and end-payors can be certified, which will necessarily turn on (among other things) whether "plaintiffs can package the evidence such that an individualized inquiry into each transaction is unnecessary." *In re Class 8 Transmission Indirect Purchaser Antitrust Litig.*, 2015 WL 6181748, at *10.

Mr. Nisbet's provisionally sealed testimony also bears on whether Thornhill can satisfy the tests for adequacy and typicality of a class representative, which are additional components of the "rigorous analysis" required for class certification. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996). The whole point of "typicality" is that a determination of the representative's claims are a reliable indicator of the claims of the other members of the putative class. *See id.* at 1082. But the unusual practice of pricing vehicles at one dollar over invoice, which Thornhill advertised and asserts it engaged in for a substantial portion of the alleged class periods, may defeat typicality. And in light of its fraudulent conduct, Thornhill also may not be an adequate representative to be entrusted with the claims of the putative class(es) of auto dealers. *See Stanich v. Travelers Indem. Co.*, 259 F.R.D. 294, 315 (N.D.Ohio 2011) (holding a plaintiff's credibility is relevant to its adequacy as a class representative where there is a connection between the dishonest conduct and the claims at issue in the class action). For all these reasons, Auto Dealers cannot seriously contest that Mr. Nisbet's testimony in the sealed portion of his deposition transcript is relevant.

In addition, regardless of how Mr. Nisbet's provisionally sealed testimony might be used by Auto Dealers, End Payors, and/or Defendants with respect to class certification and/or merits issues, it also is highly relevant because it demonstrates the inaccuracy and unreliability of much

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of the DMS data and other records Thornhill has produced in the Auto Parts MDL. This bears directly on whether these data and other records may legitimately be used to assess whether, and to what extent, Thornhill absorbed any alleged overcharges, rather than passed on any alleged overcharges to its customers, at least during the six years in which it engaged in the pricing practices and recordkeeping practices that were at issue in the *Barker* and *Jarrell* lawsuits. *See* Ex. 3, Prov. Sealed Nisbet Dep. Tr. at 29 [redacted]

B. The Remainder of Mr. Nisbet's Deposition Testimony Would Be Misleading If the Provisionally Sealed Portion Were Unavailable for Use by the Parties and the Court

If the provisionally sealed portion of Mr. Nisbet's testimony were to be hidden from the fact-finders (both Judge Battani and the relevant juries) in the Auto Parts MDL, any use of or reliance on the remaining portions of his deposition testimony would be highly misleading. In the portion of his deposition that preceded the provisionally sealed portion, Mr. Nisbet provided vague and incomplete testimony regarding Thornhill's [redacted] After Defendants' counsel confronted him with his prior sworn statements in the *Jarrell* and *Barker* lawsuits, however, Mr. Nisbet was able to provide substantially more detailed answers and, in several instances, changed his testimony entirely. For example, he initially testified that [redacted] Ex. 1, Unsealed Nisbet Dep. Tr. at 158 (emphasis added). After having his recollection refreshed by his signed affidavit from the *Jarrell* case, however, Mr. Nisbet clarified that Thornhill [redacted]

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[redacted] Ex. 3, Prov. Sealed Nisbet Dep. Tr. at 31–32.

Mr. Nisbet's substantial revision of his testimony regarding Thornhill's new car pricing practices during the early years of the alleged class period, after reviewing his prior statements in *Jarrell* and *Barker*, perhaps is understandable. His prior testimony was provided much closer in time to when Thornhill had engaged in those practices and outside the influence of the present litigation. Thus, there is no basis for Auto Dealers to object to Mr. Nisbet being confronted by his past statements for purposes of his Rule 30(b)(1) deposition. Failing to lift the provisional seal on this portion of the deposition transcript would not simply deny Defendants and the Court highly probative information, it would enshrine a misleading account of critically relevant facts.

C. The Special Master's December 29, 2015 Order on Topics for Rule 30(b)(6) Depositions Has No Bearing on Mr. Nisbet's Rule 30(b)(1) Deposition

Even putting aside the fundamental inappropriateness of Auto Dealer counsel's instruction that Mr. Nisbet not answer deposition questions based on an assertion of irrelevance, *see supra* n.1, Auto Dealer counsel's sole rationale for the instruction was itself unfounded. Auto Dealer counsel claimed that inquiry into Thornhill's pricing and recordkeeping practices, as described in records from prior class action lawsuits against Thornhill and Mr. Nisbet, himself, was inappropriate during Mr. Nisbet's Rule *30(b)(1)* deposition because a December 29, 2015 Order by the Special Master had denied one of the topics in Defendants' initial notice for Rule *30(b)(6)* depositions of Auto Dealers—namely, "the facts, issues and circumstances of any other class actions in which You have participated involving Your purchase or sale of new vehicles . . . ." *See* Special Master's Order Granting in Part and Denying in Part Plaintiffs' Motion For Protective Order, 12-md-02311

ECF No. 1169 ("Dec. 29 Order"), Sch. A Topic 11. That Order, however, concerned only the topics on which a Rule *30(b)(6)* witness would be required to be prepared to testify on behalf of the dealership. By definition, that Order said nothing about appropriate lines of inquiry for a Rule *30(b)(1)* deposition based on the witness's own personal knowledge. *See* Dec. 29 Order.

In any event, even if the deposition of Mr. Nisbet were somehow controlled by the December 29 Order, Defendants' questions were plainly within the scope of topics that the Special Master expressly permitted in that Order, including "how You determine new vehicle pricing" and "Your policies, procedures, and practices for creation and maintenance of . . . deal files, DMS . . . data" and other business records "in connection with the purchase or sale of new vehicles." Dec. 29 Order at ¶¶ 5, 12 & Sch. A Topics 5, 12. Moreover, the point of the questions was not to explore whether Thornhill had been a serial *named plaintiff* in prior class action lawsuits, which presumably was the type of inquiry for which the Special Master did not want Auto Dealers' Rule 30(b)(6) designees to have to be prepared to testify. Instead, the focus here was on issues the Special Master had expressly deemed to be relevant. Defendants merely used the prior sworn statements that Mr. Nisbet happened to have made during prior litigation (as a *defendant*) to refresh his recollection and question him about Thornhill's actual *pricing practices and recordkeeping practices* during nearly half of the class periods alleged *in the present Auto Parts MDL*, thereby obtaining testimony that is directly relevant to the issues in this MDL. *See supra* Part I.A. The fact that Defendants elicited testimony about Thornhill's pricing and recordkeeping practices by reference to court documents from prior lawsuits is no basis for shielding its co-owner from questions on this important topic, especially because those documents reflected sworn statements Mr. Nisbet had made more than ten years ago—at or very near the time when Thornhill

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was still engaging in those practices, when his recollection of the facts at issue presumably was much better than it is today.

CONCLUSION

For all the reasons set forth above, Defendants respectfully request that their motion be granted and that the Special Master enter the accompanying Proposed Order lifting the provisional seal on a portion of Mr. Nisbet's deposition testimony.

Respectfully submitted,

WILMER CUTLER PICKERING
HALE AND DORR LLP

April 8, 2016 By: */s/ Steven F. Cherry*

Steven F. Cherry
David P. Donovan
Patrick J. Carome
Dyanne Griffith
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
steven.cherry@wilmerhale.com
david.donovan@wilmerhale.com
patrick.carome@wilmerhale.com
dyanne.griffith@wilmerhale.com

Attorneys for Defendants DENSO Corporation, DENSO International America, Inc., DENSO International Korea Corporation, DENSO Korea Automotive Corporation, DENSO Products & Services Americas, ASMO Co., Ltd., ASMO North America, LLC, ASMO Greenville of North Carolina, Inc., ASMO Manufacturing, Inc., and ASMO North Carolina Inc.

Steven M. Zarowny (P33362)
General Counsel
DENSO International America, Inc.
24777 Denso Drive
Southfield, MI 48033

REDACTED

Tel.: (248) 372-8252
Fax: (248) 213-2551
steve_zarowny@denso-diam.com

Attorney for Defendant DENSO International America, Inc.

SQUIRE PATTON BOGGS (US) LLP

April 8, 2016 By: */s/ Barry A. Pupkin* (w/consent)
Barry A. Pupkin
Iain R. McPhie
Jeremy W. Dutra
SQUIRE PATTON BOGGS (US) LLP
2550 M Street, N.W.
Washington, DC 20037
Tel: (202) 626-6600
Fax: (202) 626-6780
Barry.Pupkin@squirepb.com
Iain.McPhie@squirepb.com
Jeremy.Dutra@squirepb.com

Counsel for Aisan Industry Co., Ltd., Aisan Corporation of America, Franklin Precision Industry, Inc. and Hyundam Industrial Co., Ltd.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

April 8, 2016 By: /s/ *Jeremy Calsyn* (w/consent)
Jeremy Calsyn
Bradley Justus
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
Tel.: (202) 974-1500
Fax: (202) 974-1999
jcalsyn@cgsh.com
bjustus@cgsh.com

/s/ *Howard B. Iwrey* (w/consent)
Howard B. Iwrey (P39635)
DYKEMA GOSSETT PLLC
39577 Woodward Ave., Suite 300
Bloomfield Hills, MI 48304
Tel.: (248) 203-0526
Fax: (248) 203-0763
hiwrey@dykema.com

REDACTED

Counsel for Defendants Aisin Seiki Co., Ltd., and Aisin Automotive Casting, LLC in Valve Control Timing Devices/Aisin Defendants (2500) *actions*

BROOKS WILKINS SHARKEY & TURCO PLLC

April 8, 2016 By: */s/ Maureen T. Taylor* (w/consent)

Herbert C. Donovan (P51939)
Maureen T. Taylor (P63547)
BROOKS WILKINS SHARKEY & TURCO PLLC
401 Old South Woodward, Suite 400
Birmingham, MI 48009
Telephone: (248) 971-1721
Fax: (248) 971-1801
taylor@bwst-law.com
donovan@bwst-law.com

Attorneys for Defendants Alps Electric Co., Ltd.; Alps Electric (North America), Inc.; and Alps Automotive, Inc.

WEIL, GOTSHAL & MANGES LLP

April 8, 2016 By: */s/ Steven A. Reiss* (w/consent)

Steven A. Reiss
Adam C. Hemlock
Kajetan Rozga
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153-0119
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
steven.reiss@weil.com
adam.hemlock@weil.com
kajetan.rozga@weil.com

/s/ Frederick R. Juckniess (w/consent)

Frederick R. Juckniess
SCHIFF HARDIN LLP
350 South Main Street, Suite 210
Ann Arbor, MI 48104
(734) 222-1504
fjuckniess@schiffhardin.com

Attorneys for Defendants Bridgestone Corporation and Bridgestone APM Company

REDACTED

WEIL, GOTSHAL & MANGES LLP

April 8, 2016

By: */s/ Steven A. Reiss* (w/consent)

Steven A. Reiss
Adam C. Hemlock
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153-0119
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
steven.reiss@weil.com
adam.hemlock@weil.com

/s/ Fred K. Herrmann (w/consent)

Fred K. Herrmann
Joanne G. Swanson
Matthew L. Powell
KERR RUSSELL & WEBER PLC
500 Woodward Avenue
Suite 2500
Detroit, MI 48226
Tel. (313) 961-0200
Fax (313) 961-0388
fherrmann@kerr-russell.com
jswanson@kerr-russell.com
mpowell@kerr-russell.com

Attorneys for Calsonic Kansei Corporation and CalsonicKansei North America, Inc.

/s/ Steven A. Reiss (w/consent)

Steven A. Reiss
Adam C. Hemlock
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153-0119
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
steven.reiss@weil.com
adam.hemlock@weil.com

/s/ Michael A. Cox (w/consent)

Michael A. Cox
THE MIKE COX LAW FIRM, PLLC
17430 Laurel Park Drive North, Suite 120 E
Livonia, MI 48152

REDACTED

Telephone: (734) 591-4002
mc@mikecoxlaw.com

Attorneys for Calsonic Kansei Corporation and CalsonicKansei North America, Inc.

SIMPSON THACHER & BARTLETT LLP

April 8, 2016 By: /s/ *Matthew J. Reilly* (w/consent)
Matthew J. Reilly
Abram J. Ellis
SIMPSON THACHER & BARTLETT LLP
900 G Street, N.W.
Washington, D.C. 20001
Tel.: (202) 636-5500
Fax: (202) 636-5502
matt.reilly@stblaw.com
aellis@stblaw.com

George S. Wang
Shannon K. McGovern
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, N.Y. 10017
Tel: (212) 455-2000
Fax: (212) 455-2502
gwang@stblaw.com
smcgovern@stblaw.com

Attorneys for Defendants Diamond Electric Mfg. Co., Ltd. and Diamond Electric Mfg. Corp.

PORTER WRIGHT MORRIS & ARTHUR LLP

April 8, 2016 By: */s/ Donald M. Barnes* (w/consent)
Donald M. Barnes
Molly S. Crabtree
Jay L. Levine
Christopher C. Yook
PORTER WRIGHT MORRIS & ARTHUR LLP
1900 K Street, NW, Ste. 1110
Washington, DC 20006
Tel.: (202) 778-3054
Fax: (202) 778-3063
dbarnes@porterwright.com
mcrabtree@porterwright.com

jlevine@porterwright.com
cyook@porterwright.com

Attorneys for Defendants G.S. Electech, Inc., G.S.W. Manufacturing, Inc., and G.S. Wiring Systems, Inc.

COVINGTON & BURLING LLP

April 8, 2016

By: /s/ *Bruce A. Baird* (with consent)

Bruce A. Baird
Sarah L. Wilson
Michael A. Fanelli
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
Telephone: (202) 662-6000
Fax: (202) 662-6291
bbaird@cov.com
swilson@cov.com
mfanelli@cov.com

Anita F. Stork
COVINGTON & BURLING LLP
One Front Street
35th Floor
San Francisco, CA 94111
Telephone: (415) 591-6000
Fax: (415) 955-6550
astork@cov.com

BROOKS WILKINS SHARKEY & TURCO PLLC
Maureen T. Taylor
BROOKS WILKINS SHARKEY & TURCO PLLC
401 Old South Woodward, Suite 400
Birmingham, MI 48009
Telephone: (248) 971-1721
Fax: (248) 971-1801
taylor@bwst-law.com

Attorneys for Defendant Keihin North America, Inc.

REDACTED

ARNOLD & PORTER LLP

April 8, 2016 By: /s/ *Franklin R. Liss* (with consent)

Franklin R. Liss
Barbara H. Wootton
Danielle M. Garten
Matthew Tabas
ARNOLD & PORTER LLP
601 Massachusetts Ave, NW
Washington, DC 20001
Tel: (202) 942-5969
Fax: (202) 942-5999
frank.liss@aporter.com
barbara.wootton@aporter.com
danielle.garten@aporter.com
matt.tabas@aporter.com

/s/ *Howard B. Iwrey* (with consent)

Howard B. Iwrey (P39635)
Brian M. Moore (P58584)
DYKEMA GOSSETT PLLC
39577 Woodward Ave., Suite 300
Bloomfield Hills, MI 48304
Tel: (248) 203-0700
Fax: (248) 203-0763
hiwrey@dykema.com
bmoore@dykema.com

Counsel for Koito Manufacturing Co., Ltd. and North American Lighting, Inc. in HID Ballasts (1700) *and* Lamps (1200) *actions*

PILLSBURY WINTHROP SHAW PITTMAN LLP

April 8, 2016 By: */s/ William M. Sullivan Jr.* (w/consent)

William M. Sullivan Jr.
Michael L. Sibarium
Jeetander T. Dulani
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, N.W.
Washington, D.C. 20036-3006
Telephone: (202) 663-8000
Facsimile: (202) 663-8007
wsullivan@pillsburylaw.com

REDACTED

michael.sibarium@pillsburylaw.com
jeetander.dulani@pillsburylaw.com

Counsel for Defendants Mikuni America Corporation and Mikuni Corp

GIBSON, DUNN & CRUTCHER LLP

April 8, 2016 By: */s/ George A. Nicoud* (w/consent)
George A. Nicoud III
Austin Schwing
Caeli A. Higney
Brandon W. Halter
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105-0921
Tel.: (415) 393-8200
Fax: (415) 393-8306
TNicoud@gibsondunn.com
ASchwing@gibsondunn.com
CHigney@gibsondunn.com
BHalter@gibsondunn.com

Counsel for Defendants Mitsuba Corporation and American Mitsuba Corporation

HOGAN LOVELLS US LLP

April 8, 2016 By: */s/ William L. Monts, III* (w/consent)
William L. Monts, III
HOGAN LOVELLS US LLP
555 13th Street, NW
Washington, DC 20004
Tel.: (202) 637-5731
Fax: (202) 637-5910
william.monts@hoganlovells.com

/s/ Scott T. Seabolt (w/consent)
Scott T. Seabolt
FOLEY & LARDNER LLP
500 Woodward Avenue,
Suite 2700
Detroit, MI 48226
Tel.: (313) 234-7115
Fax: (313) 234-2800
sseabolt@foley.com

REDACTED

Counsel for Defendants Mitsubishi Heavy Industries America, Inc. and Mitsubishi Heavy Industries Climate Control

LANE POWELL PC

April 8, 2016 By: */s/ Kenneth R. Davis II* (w/consent)

Craig D. Bachman
Kenneth R. Davis II
Darin M. Sands
Masayuki Yamaguchi
MODA Tower
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2100
bachmanc@lanepowell.com
davisk@lanepowell.com
sandsd@lanepowell.com
yamaguchim@lanepowell.com

Larry S. Gangnes
LANE POWELL PC
U.S. Bank Centre
1420 Fifth Avenue, Suite 4200
PO Box 91302
Seattle, WA 98111-9402
Telephone: 206.223.7000
gangnesl@lanepowell.com

Richard D. Bisio (P30246)
Ronald S. Nixon (P57117)
KEMP KLEIN LAW FIRM
201 W. Big Beaver, Suite 600
Troy, MI 48084
Telephone: 248.528.1111
richard.bisio@kkue.com
ron.nixon@kkue.com

Attorneys for Defendants Nachi-Fujikoshi Corp. and Nachi America Inc.

WINSTON & STRAWN LLP

April 8, 2016 By: */s/ Jeffrey L. Kessler* (w/consent)

A. Paul Victor

REDACTED

Jeffrey L. Kessler
Jeffrey J. Amato
Molly M. Donovan
Elizabeth A. Cate
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 294-6700
Facsimile: (212) 294-4700
pvictor@winston.com
jkessler@winston.com
mmdonovan@winston.com
jamato@winston.com
ecate@winston.com

Fred K. Herrmann (P49519)
KERR, RUSSELL AND WEBER, PLC
500 Woodward Avenue, Suite 2500
Detroit, MI 48226
Tel. (313) 961-0200
fherrmann@kerr-russell.com

Attorneys for Defendants NTN Corporation and NTN USA Corporation

WINSTON & STRAWN LLP

April 8, 2016 By: /s/ *Jeffrey L. Kessler* (w/consent)

Jeffrey L. Kessler
A. Paul Victor
Eva W. Cole
Jeffrey J. Amato
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193
(212) 294-6700 (t)
(212) 294-4700 (f)
JKessler@winston.com
PVictor@winston.com
EWCole@winston.com
JAmato@winston.com

Brandon Duke
WINSTON & STRAWN LLP
1111 Louisiana Street, 25th Floor
Houston, TX 77002

REDACTED

(713) 651-2636 (t)
(713) 651-2700 (f)
BDuke@winston.com

Counsel for Panasonic Corporation and Panasonic Corporation of North America

ALLEN & OVERY LLP

April 8, 2016 By: */s/ John Roberti* (w/consent)

John Roberti
Matthew R. Boucher
ALLEN & OVERY LLP
1101 New York Avenue NW
Washington, D.C. 20005
202-683-3800
john.roberti@allenovery.com
matthew.boucher@allenovery.com

Michael S. Feldberg
ALLEN & OVERY LLP
1221 Avenue of the Americas
New York, NY 10020
212-610-6360
michael.feldberg@allenovery.com

William R. Jansen (P36688)
Michael G. Brady (P57331)
WARNER NORCROSS & JUDD LLP
2000 Town Center, Suite 2700
Southfield, MI 48075-1318
248-784-5000
wjansen@wnj.com
mbrady@wnj.com

Counsel for Robert Bosch LLC and Robert Bosch GmbH

DUBOIS, BRYANT & CAMPBELL, LLP

April 8, 2016 By: */s/ J. David Rowe* (w/consent)

J. David Rowe
Millicent Lundburg
DUBOIS, BRYANT & CAMPBELL, LLP
Colorado Tower
303 Colorado, Suite 2300

Austin, Texas 78701
(512) 457-8000
(512) 457-8008 (fax)
drowe@dbcllp.com
mlundburg@dbcllp.com

DUGGINS WREN MANN & ROMERO, LLP
Robert E. Linkin
600 Congress Avenue, Ste. 1900
P. O. Box 1149
Austin, Texas 78767-1149
512-744-9300 tel.
512-744-9399 fax.
rlinkin@dwmrlaw.com

HERTZ SCHRAM PC
Bradley J. Schram (P26337)
Matthew J. Turchyn (P76482)
1760 South Telegraph Road, Suite 300
Bloomfield Hills, MI 48302
(248) 335-5000
bschram@hertzschram.com
mturchyn@hertzschram.com

Attorney for Defendant Sanden International (USA), Inc.

SIMPSON THACHER & BARTLETT LLP

April 8, 2016

By: */s/ Matthew J. Reilly* (w/consent)

Matthew J. Reilly
Abram J. Ellis
David T. Shogren
SIMPSON THACHER & BARTLETT LLP
900 G Street, N.W.
Washington, D.C. 20001
Tel.: (202) 636-5500
Fax: (202) 636-5502
matt.reilly@stblaw.com
aellis@stblaw.com
dshogren@stblaw.com

George S. Wang
Shannon K. McGovern
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue

REDACTED

New York, N.Y. 10017
Tel: (212) 455-2000
Fax: (212) 455-2502
gwang@stblaw.com
smcgovern@stblaw.com

Attorneys for Defendants Stanley Electric Co., Ltd., Stanley Electric U.S. Co., Inc., and II Stanley Co., Inc.

MORGAN LEWIS & BOCKIUS LLP

April 8, 2016 By: */s/ J. Clayton Everett, Jr.* (w/consent)

J. Clayton Everett, Jr.
MORGAN LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 739-3000
Facsimile: (202) 739-3001
jeverett@morganlewis.com

Counsel for Defendants Sumitomo Riko Company Limited and DTR Industries, Inc.

SIDLEY AUSTIN LLP

April 8, 2016 By: */s/ David C. Giardina* (w/consent)

David C. Giardina
Courtney A. Hoffmann
SIDLEY AUSTIN LLP
One S. Dearborn St.
Chicago, IL 60603
Tel.: (312) 853-7000
Fax: (312) 853-7036
dgiardina@sidley.com
choffmann@sidley.com

Bradley J. Schram (MI Bar # P26337)
HERTZ SCHRAM PC
1760 S. Telegraph Rd., Suite 300
Bloomfield Hills, MI 48302
Tel.: (248) 335-5000
Fax: (248) 335-3346
bschram@hertzschram.com

Counsel for Defendants Toyo Tire & Rubber Co.,

REDACTED

Ltd., Toyo Tire North America Manufacturing Inc., Toyo Tire North America OE Sales LLC, and Toyo Automotive Parts (USA), Inc.

BAKER BOTTS L.L.P.

April 8, 2016 By: */s/ Randall J. Turk* (w/consent)

Randall J. Turk
John Taladay
Mark Miller
Heather Souder Choi
Sterling A. Marchand
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue., NW
Washington, D.C. 20004-2400
Phone: 202.639.7700
Fax: 202.639.7890
randy.turk@bakerbotts.com
john.taladay@bakerbotts.com
mark.miller@bakerbotts.com
heather.choi@bakerbotts.com

Counsel for Defendants Toyoda Gosei Co., Ltd., Toyoda Gosei North America Corp., and TG Missouri Corp.

BUTZEL LONG

April 8, 2016 By: */s/ Sheldon H. Klein* (w/consent)

Sheldon H. Klein (P41062)
David F. DuMouchel (P25658)
BUTZEL LONG
150 West Jefferson, Suite 100
Detroit, MI 48226
Tel.: (313) 225-7000
Fax: (313) 225-7080
sklein@butzel.com
dumouchd@butzel.com

W. Todd Miller
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW, Suite 300
Washington, DC 20037
Tel.: (202) 663-7820
Fax: (202) 663-7849
TMiller@bakerandmiller.com

REDACTED

Attorneys for Defendants TRAM, Inc. and Tokai Rika Co., Ltd.

LATHAM & WATKINS LLP

April 8, 2016

By: /s/ *Marguerite M. Sullivan* (w/consent)

Marguerite M. Sullivan
Allyson M. Maltas
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004
Tel: (202) 637-2200
Fax: (202) 637-2201
Maggy.Sullivan@lw.com
Allyson.Maltas@lw.com

/s/ *Howard B. Iwrey* (w/consent)

Howard B. Iwrey (P39635)
DYKEMA GOSSETT PLLC
39577 Woodward Ave., Suite 300
Bloomfield Hills, MI 48304
Tel: (248) 203-0526
Fax: (248) 203-0763
hiwrey@dykema.com

Counsel for Weastec, Inc. in Ignition Coils (1400) *actions*

REDACTED

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2016, I caused the foregoing **DEFENDANTS' MOTION TO LIFT THE PROVISIONAL SEALING OF PART OF THE 30(B)(1) DEPOSITION OF THE CO-OWNER OF AUTO DEALER PLAINTIFF THORNHILL SUPERSTORE**, and supporting memorandum of law, to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Steven F. Cherry

Steven F. Cherry
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
steven.cherry@wilmerhale.com

Attorney for Defendants DENSO Corporation, DENSO International America, Inc., DENSO International Korea Corporation, DENSO Korea Automotive Corporation, DENSO Products & Services Americas, ASMO Co., Ltd., ASMO North America, LLC, ASMO Greenville of North Carolina, Inc., ASMO Manufacturing, Inc., and ASMO North Carolina Inc.